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14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 SAN JOSE DIVISION

17 IN RE: HIGH-TECH EMPLOYEE
18 ANTITRUST LITIGATION

19 THIS DOCUMENT RELATES TO:

20 All Actions

Master Docket No. 11-CV-2509-LHK

**PLAINTIFFS' RESPONSE TO THE NON-
SETTLING DEFENDANTS'
UNAUTHORIZED SUPPLEMENTAL
FILING**

Date: October 21, 2013
Time: 2:00 p.m.
Courtroom: Room 8, 4th Floor
Judge: Honorable Lucy H. Koh

1 Plaintiffs hereby respond to the unauthorized supplemental filing submitted on October
 2 17, 2013 by Adobe Systems, Inc., Apple Inc., Google Inc., and Intel Corp. (the “Non-Settling
 3 Defendants”) (Dkt. 523).

4 **I. Effective, Efficient, Class-Focused Notice and Claims Administration Here Require**
 5 **Production of Certain Class Member Data**

6 Whether certifying the Class for settlement or litigation purposes, “the court must direct to
 7 Class Members the best notice that is practicable under the circumstances, including individual
 8 notice to all members who can be identified through reasonable effort.” Fed. R. Civ. P.
 9 23(c)(2)(B). In assessing the proposed settlements with Lucasfilm, Ltd., Pixar, and Intuit Inc.
 10 (the “Settling Defendants”), the Court must determine whether the settlements are “fair,
 11 reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2). That inquiry may include an analysis of “the
 12 fairness and reasonableness of the procedure for processing individual claims under the
 13 settlement[.]” Manual for Complex Litigation, Fourth § 21.62, at 315-316.

14 Plaintiffs seek the confidential production of Class Member data to the Claims
 15 Administrator to provide Class Members with “the best notice that is practicable under the
 16 circumstances” and to ensure that the procedure for processing Class claims is as “fair,
 17 reasonable, and adequate” as possible. That data includes, for the Class period: the full legal
 18 name, Social Security number, email addresses, last known physical address, dates of
 19 employment in that Defendant’s Class job titles, and associated base salary by date and relevant
 20 Class job title of each Class Member who was employed by that Defendant. All of this
 21 information—except name, address, and social security number—were collected and produced to
 22 Plaintiffs earlier in the case. Consistent with similar cases in this District, the Settling Defendants
 23 have already agreed to provide all of this necessary information to the Claims Administrator.
 24 (Lucas/Pixar Settlement § II.B; Intuit Settlement § II.B.) Subject to the Protective Order (Dkt.
 25 24), the Claims Administrator “shall utilize Class Members’ information provided by the Settling
 26 Defendants solely for purposes of effectuating notice and administering the Settlement Fund,
 27 including withholding taxes, and shall keep the information confidential, including from Class
 28 Counsel.” (*Id.*)

1 Under the proposed procedure for administering notice and claims, the Claims
2 Administrator will mail and e-mail notices to Class Members and will create a case-specific
3 website that will include case information, court documents relating to the settlements, the notice,
4 and a link for electronic claim filing. (Proposed Order Granting Plaintiffs' Motion for
5 Conditional Class Certification and Preliminary Approval of Partial Class Action Settlement ¶ 15;
6 *see also* Lucas/Pixar Settlement, Exs. A and B (notice and claim form); Intuit Settlement, Exs. A
7 and B (same).) The plan of allocation will distribute the Settlement Fund to claimants based upon
8 a formula utilizing each claimant's base salary paid while working in a class position within the
9 Class period as set forth in the Class definition. (Lucas/Pixar Settlement, Ex. C; Intuit Settlement,
10 Ex. C.) Because the Settlement Fund is a fixed amount and no portion will revert back to the
11 Non-Settling Defendants, each claimant's share depends upon the claims of other Class Members.

12 With the Class Members' information confidentiality maintained by the Claims
13 Administrator, Class Members will be able to go to the case-specific website and access their
14 individual employment records to confirm their eligibility and confirm the relevant information
15 upon which their portion of the Settlement Fund will be allocated (*e.g.*, pay in Class positions
16 during the Class period). Access will be limited only to Class Members who provide both their
17 unique claim number and their Social Security number (or last four digits). No Defendant will
18 receive information about which Class members filed claims. The confidentiality of the claims
19 process is particularly important for current employees, who may fear retaliation if their
20 Defendant-employer learned that they were submitting claims.

21 This proposed claims procedure minimizes the burden on Class Members, maximizes
22 accuracy and fairness in distributing the Settlement Fund, and protects Class Member privacy.
23 *See* Manual for Complex Litigation, Fourth § 21.66 at 331 ("Completion and documentation of
24 the claims forms should be no more burdensome than necessary."). It is in the best interests of
25 Class members and is far superior to the unwieldy approach sought by Non-Settling Defendants.

26 The Non-Settling Defendants assert that Class members should be required to research
27 and submit all of the information about their own dates of pay in Class titles during the Class
28 period upon which the Settlement Fund will be allocated. Non-Settling Defendants have made no

1 argument that producing this information on behalf of Class Members would be burdensome or
2 difficult (nor could they given their prior production of virtually this same information, minus
3 name and contact information, to Plaintiffs). Non-Settling Defendants argue that they are trying
4 to protect Class member “privacy,” but this argument is not persuasive. The Claims
5 Administrator will enter into protective or other confidentiality agreements to protect this data,
6 and no individual Class Member information produced to the Claims Administrator will be shared
7 with Plaintiffs’ counsel.¹

8 If Defendants do not provide this reliable Class Member information to the Claims
9 Administrator, it will reduce the fairness, reasonableness, and adequacy of the settlements;
10 discourage claims; and undermine Class Member privacy interests. Class Members seeking to
11 submit a claim would be forced to rely on their own memories rather than being able to confirm
12 their actual job and salary information by reviewing (privately) Defendants’ records of their
13 relevant work history through protected password on the Claims Administrator website. Instead,
14 Class Members would be required to self-report their Class job titles and base salaries during the
15 Class period to the Claims Administrator, with the Claims Administrator then being required
16 either (1) to verify such information with each Defendant or (2) to accept self-reported, unverified
17 information and expose the Settlement process to a high degree of inaccuracy or even fraud. The
18 interests most harmed in this approach are those of the Class Members, who would be required to
19 undertake a massively burdensome notice process that *at best* might involve their claims status
20 being revealed to their employer. This makes no sense given that Defendants already maintain
21 the data in a reliable and readily accessible form that can be produced to the Claims
22 Administrator confidentially.

23 The absurdity of Non-Settling Defendants’ approach is made clear by imagining the
24 experience of a hypothetical Class Member who worked in a (non-Class) marketing position at
25 Google for part of 2006, then was promoted to a (Class) product development position at a
26 different salary at the end of 2006, and then left Google for a (Class) product development

27 ¹ Plaintiffs also believe that a single confidential production of data by Defendants to the Claims
28 Administrator is the superior means of safeguarding the security of the information at issue rather
than in thousands of individual submissions.

position at Apple in mid-2007, where she worked until the end of the Class period. Under the approach advocated by Non-Settling Defendants, in order to make a claim that Class Member would be required to: (1) recall her relevant dates of employment concerning jobs held over seven years ago; (2) recall changes in job title that might have moved her in and out of Class positions or resulted in mid-year changes in salary; and (3) remember her precise base salary for Class job titles during the Class period. It is unlikely this Class Member could rely on any documentation she has in her possession, as the question of Class titles and associated base salary is different than W-2 earnings, which (even if she had proof of those) might report pay for both Class and non-Class positions and earnings beyond just base salary (such as bonus). If the Class Member had no records of her relevant historical employment information, what is she expected to do? Are Defendants planning to designate Human Resources contacts to search these histories one at a time? Would the Claims Administrator be expected to deny claims where the claimant is not able to answer such questions? The Non-Settling Defendants have no answers to these questions. Instead, they suggest requiring each Class Member to first confirm that the Class Member wants the information to be provided by Defendants to the Claims Administrator, thus requiring each Class Member to identify herself to employer Defendants. This unduly burdensome process, with its associated violation of claimant confidentiality, would discourage and delay claims.

II. Courts Routinely Order Production of Class Member Information of the Type Requested Here

Courts routinely order production of Class Member identifying data, associating names with job histories, to plaintiffs' counsel in contested class actions. For instance, in *Bennett, et al. v. Simplexgrinnell LP*, Case No. 11-1854-PJG (N.D. Cal. Sept. 25, 2013) (Dkt. No. 89), the Court granted a motion to compel production of electronic data relating to work performed by members of the proposed class, including identifying information. The Court observed: "The law in this district strongly favors Plaintiffs, as courts in this district 'commonly' order defendants not only to identify, but to produce contact information for, putative class members before class certification." *Id.* at 89 (citing *Artis v. Deere & Co.*, 276 F.R.D. 348, 352 (N.D. Cal. 2011)) (compelling disclosure of contact information before certification and noting that "[t]he

disclosure of names, addresses, and telephone numbers is a common practice in the class action context”); *Babbitt v. Albertson’s Inc.*, 1992 U.S. Dist. LEXIS 19091, *2 (N.D. Cal. Nov. 30, 1992) (ordering contact information and social security numbers of putative class members before class certification).). *See also Algee v. Nordstrom, Inc.*, 2012 U.S. Dist. LEXIS 62232, *11-*15 (N.D. Cal. May 3, 2012) (citing cases and concluding that privacy objections must yield to the need for information). Here, where it is expected that settlement class certification will be granted, objections to producing Class member information are even more meritless.

Production of Class Member data is particularly routine where, as here, the data will be provided only to a third-party administrator subject to a protective order. *See, e.g., Ellis v. Costco Wholesale Corp.*, Case No. 04-3341-EMC, 2012 U.S. Dist. LEXIS 169894, at *8 (N.D. Cal. Nov. 29, 2012) (“Given the protective order in this case, providing social security numbers and home telephone numbers does not constitute an undue risk to the privacy of the Class Members. Accordingly, Costco shall provide this information to the third-party administrator the parties have identified for administering notice to Class Members.”). Just as in *Costco*, here, the Non-Settling Defendants “do[] not address why a protective order does not address the risk of fraud or identity theft, and does not argue that the protective order is somehow inadequate.” *Id.* The Protective Order here (Dkt. No. 24), combined with the proposed notice and claims procedures, are appropriate to safeguard Class Member privacy.

In support of their refusal to provide Class Member data to the Claims Administrator, the Non-Settling Defendants rely on inapposite authority. For instance, *Los Angeles Gay and Lesbian Ctr. v. Super. Ct.*, 194 Cal. App. 4th 288 (Cal. Ct. App. 2011) involved a proposed class of patients of a medical center who had mistakenly received the wrong medication for syphilis. At issue was whether discovery of “extremely sensitive” medical information (including names, addresses, and possible HIV status of Class Members), was appropriate to a “wide array of third persons in connection with the litigation” and to the named plaintiffs and their counsel. *Id.* at 308. The Court held that disclosure of such information to the parties was improper, but found that the information “shall be disclosed to a court-appointed class administrator for the purpose of mailing the notice of the class action to all putative Class Members.” *Id.* at 310.

Other cases on which the Non-Settling Defendants purport to rely deal not with a proposed settlement class under Rule 23, but rather with conditional certification under the Fair Labor Standards Act. *Delgado v. Ortho-McNeil, Inc.*, No. 07-263, 2007 U.S. Dist. LEXIS 74731 (C.D. Cal. Aug. 7, 2007); *Gilbert v. Citigroup, Inc.*, No. 08-0385, 2009 U.S. Dist. LEXIS 18981 (N.D. Cal. Feb. 18, 2009). In *Campbell v. Pricewaterhouse Coopers, LLP*, No. S-06-2376, 2008 U.S. Dist. LEXIS 44795 (E.D. Cal. June 5, 2008), the issue was whether the identifying information should be produced to class counsel. The Non-Settling Defendants also cite to cases for the uncontroversial proposition that privacy interests are important. However, these cases found that the privacy interests at issue were outweighed by the need for the information.²

III. Production of Social Security Numbers is Also Routine

There is no reason for Defendants to withhold Class Member Social Security numbers. This information is necessary to provide the “best notice that is practicable under the circumstances,” Fed. R. Civ. P. 23(c)(2)(B), because it allows for the most accurate form of “skip-tracing”—the ability to locate Class Members who have moved from their last known address (an address that in many cases will not have been updated in over eight years), and Social Security numbers are required for the Claims Administrator to complete required tax withholding for every claimant. It is certainly not in Class Members’ interests to be required to submit such numbers individually.

Non-Settling Defendants seem to think that production of Social Security numbers is unusual in a claims process. They are wrong. *See, e.g., Vedachalam, et al. v. Tata Consultancy Servs.*, Case No. 06-0963-CW, at 4 (N.D. Cal. Apr. 5, 2013) (Dkt. 336) (preliminarily approving class action settlement, ordering: “Defendants will provide the Settlement Administrator a database in a format acceptable to the Settlement Administrator, listing for all Class Members

² *See In re Crawford*, 194 F.3d 954, 962 (9th Cir. 1999) (upholding bankruptcy court’s \$800 fine assessed against a non-attorney bankruptcy petition preparer who deliberately omitted his social security number on bankruptcy petitions he had prepared); *Soto v. City of Concord*, 162 F.R.D. 603, 617 (N.D. Cal. 1995) (granting plaintiffs’ motion to compel discovery of defendant police officers’ personnel files); *Pioneer Elecs. (USA), Inc. v. Superior Court*, 40 Cal. 4th 360, 373 (2007) (overturning appellate court’s reversal of a trial court’s authorization of a notice letter to DVD player purchasers, stating that non-response to the notice letter constituted consent to be contacted by plaintiffs’ counsel).

each Class Member's name, last known home and email address, Social Security number, amount of tax refunds repaid to Defendants, and dates of employment for Defendants in the United States during the Class Period."), attached hereto as Exhibit A; *Buccellato, et al. v. AT&T Operations, Inc.*, Case No. 10-00464-LHK, at 6 (preliminarily approving class action settlement and certifying settlement class, ordering: "AT&T will provide the Settlement Administrator a database in a format acceptable to the Settlement Administrator, listing for all Class Members each Class Member's name, last known address, Social Security number, AT&T employee identification number, dates and state(s) of employment listed by Covered Position held, and the number of Compensable Work Weeks in a Covered Position during a Covered Period."), attached hereto as Exhibit B; *Higazi v. Cadence Design Systems, Inc.*, Case No. 07-2813-JW, at 2 (N.D. Cal. Apr. 1, 2008) (Dkt. 60) (stipulation and order requiring defendant to "provide to the Settlement Administrator a database that lists, for each Class Member, the Class Member's name, Social Security number, last known address, dates and state(s) of employment, and the number of compensable work weeks in a Covered Position during a Covered Period"), attached hereto as Exhibit C; *Satchell, et al. v. Federal Express Corp.*, Case No. 03-2659-SI, at 8 (N.D. Cal. Apr. 9, 2007) (Dkt. 285) (preliminarily approving class action settlement and certifying settlement class, ordering: "FedEx Express shall provide the Claims Administrator with computer readable information, in a format acceptable to the Claims Administrator, that contains the full names, social security numbers, FedEx employee ID, last known addresses and phone numbers, start dates and, as applicable, end dates of employment with FedEx Express"), attached hereto as Exhibit D.

Likewise, in *Rees v. Souza's Milk Transp. Co.*, 2006 U.S. Dist. LEXIS 84514 (E.D. Cal. Nov. 8, 2006), the defendant made the same objection the Non-Settling Defendants make here to producing Class Member Social Security numbers, and also sought to rely improperly upon California Civil Code Section 1798.85. The Court rejected the argument and ordered production of Social Security numbers. "The preclusions to the dissemination of social security numbers listed in § 1798.85 of the California Civil Code are irrelevant: (1) display of social security numbers to the general public, (2) printing of social security numbers on cards required to obtain

goods or services, (3) requiring persons to transmit their social security numbers over the internet without encryption, (4) requiring use of a social security number to access an internet web site without also requiring a password or unique personal identification number, and (5) the printing of social security numbers on mailed forms unless required by state or federal law.” *Id.* at *5. “None of these preclusions addresses the situation at issue here, where putative Class Members need to be located so that their rights under federal and state law may be advanced and protected.” *Id.* The court also observed that the “disclosure of names, addresses, social security numbers, and employment dates of putative Class Members is a common practice in the class action context.” *Id.* at *3 (collecting cases).

IV. The Non-Settling Defendants’ Filing is Unauthorized and Should be Disregarded

Pursuant to Local Rule 16-10(d), the parties filed a Joint Case Management Statement on September 26, 2013, in advance of the scheduled October 3, 2013 Case Management Conference. (Dkt. 508.) On October 1, 2013, the Court continued the Case Management Conference to October 21, 2013. (Dkt. 511.) If the Non-Settling Defendants wished to file an “updated” Case Management Statement, they were required to meet and confer with Plaintiffs so that a joint statement could be filed no later than October 14, 2013. Local Rule 16-10(d) (requiring that Case Management Statements be filed “no fewer than 7 days before any subsequent case management conference”). The Non-Settling Defendants did not meet and confer with Plaintiffs in advance of the deadline.

Instead, the Non-Settling Defendants’ counsel contacted Plaintiffs’ counsel in the afternoon of October 15, 2013, after the deadline to file a Joint Case Management Statement had already elapsed, indicating their intent to file supplemental argument on positions stated in their previous Joint CMC Statement. Plaintiffs’ counsel informed the Non-Settling Defendants’ counsel that the time for filing had expired (and therefore a supplemental filing would be improper), and encouraged the Non-Settling Defendants to meet and confer with Plaintiffs regarding any outstanding issues in an effort to clarify or resolve them in advance of the Case Management Conference. After meeting and conferring, the Non-Settling Defendants insisted on filing a late statement over Plaintiffs’ objections, and did so Thursday evening, two Court days

1 before the Case Management Conference. (Dkt. 523.)

2 **V. Conclusion**

3 Plaintiffs do not seek to discover additional Class Member information for use in the
4 litigation. Rather, Plaintiffs ask that the Court order the Non-Settling Defendants to produce to
5 the Claims Administrator the same information the Settling Defendants have already agreed to
6 produce, that is almost entirely information previously produced to Plaintiffs (less personally
7 identifying information), and that is routinely produced in this context. Providing this data to the
8 Claims Administrator will facilitate notice, minimize the burden on Class Members, ensure
9 accurate allocation of the settlements to claimants, and maintain the confidentiality of the claims
10 process.

11
12 Dated: October 19, 2013

Respectfully Submitted,

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